EXECUTIVE SECRETARIAT
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9	Chm/NIC				
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12	Compt				
13	D/OLL				
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15	VC/NIC				
16	C/ACIS		X		
17	D/SOVA		X		
18	NIO/SP		X		
19	NIO/USSR		X		
20	ES		X		
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Remarks

STAT

Executive Secretary
30 OCT 85
Date

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3637 (10-81)

STATEMENT OF ABRAHAM D. SOFAER

LEGAL ADVISER, U.S. DEPARTMENT OF STATE

BEFORE THE SUBCOMMITTEE ON

ARMS CONTROL, INTERNATIONAL SECURITY AND SCIENCE

OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS

OCTOBER 22, 1985

Mr. Chairman, and Members of the Committee:

This is my first appearance before your Committee. I am honored by your invitation to discuss the meaning of the Anti-Ballistic Missile Treaty with respect to so-called future ABM systems or components, including some contemplated as part of the Strategic Defense Initiative.

The ABM Treaty is an important element of our strategic arms control structure. When the President first announced the SDI program in March 1983, he made clear that it would be conducted "consistent with our obligations [under] the ABM treaty." This commitment has been maintained. The United States has scrupulously complied with the Treaty, notwithstanding such clear Soviet violations of it as the Krasnoyarsk radar station.

Soviet violations of the ABM Treaty, the implementation of our SDI program, and the ongoing arms negotiations at Geneva recently caused various agencies to consider more thoroughly than ever before the appropriate interpretation of the ABM Treaty as it relates to future or "exotic" systems. By that, I mean defensive systems that serve the same functions as ABM systems and components, but that use devices based on technology not understood in 1972 when the Treaty was negotiated and that are capable of substituting for ABM interceptor missiles, launchers, and radars. This examination

has led to the conclusion that a reading of the ABM Treaty that would allow the development and testing of such systems based on physical principles other than those understood in 1972 is wholly justified.

At the same time, however, I want to emphasize a critical point made by Secretary Shultz in his speech to the North Atlantic Assembly last week: "[O]ur SDI research program has been structured, and, as the President has reaffirmed [on October 11], will continue to be conducted in accordance with a restrictive interpretation of the Treaty's obligations." Secretary Shultz assured our NATO allies of "[o]ur commitment to pursue the program as currently structured, which is consistent with a restrictive interpretation of our obligations under the ABM Treaty." Accordingly, he described the debate over the two interpretations as "moot." The issue may have practical significance only when the SDI program has reached the point at which questions regarding the feasibility of strategic defense have been answered and engineering development, with a view to deployment, becomes a real option.

I was well aware when I began my work on this issue that several officials associated with the SALT I negotiations, and others still in the Government, had advanced the view that the ABM Treaty is unambiguous in its treatment of such future systems. They argued that Article V of the Treaty forbids development, testing, or deployment of any future ABM systems

and components other than those that are fixed land-based. They read Agreed Statement D as relevant only to fixed land-based systems and components, arguing that it permits "creation" of such systems and components when they are based on "other physical principles," but conditions their deployment on agreement between the parties on specific limitations. Other persons were contending, however, that this "restrictive" view of the ABM Treaty is based on unilateral assertions by U.S. negotiators; that the Treaty is ambiguous; and that the negotiating record supports a broader view of our freedom to develop, test, and deploy future systems.

My study of the Treaty led me to conclude that its language is ambiguous and can more reasonably be read to support a broader interpretation. An examination of the three provisions primarily at issue will demonstrate why this is so. Article II(1) defines an "ABM system" as "a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of" ABM interceptor missiles, ABM launchers, and ABM radars. Article V(1) provides that the parties agree "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." Agreed Statement D, a side agreement that accompanies the Treaty, provides as follows:

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

The restrictive interpretation rests on the premise that Article V(1) is clear on its face: it says no development, testing, or deployment of "ABM systems or components" other than those that are fixed land-based. But this language does not settle the issue of the article's applicability to future systems or components. That issue depends on the meaning of the term "ABM systems or components": is that phrase limited to systems and components based on then-current technology, or does it also include those based on future technology?

In attempting to answer this question, one must turn to the definition of "ABM system" in Article II(1). Proponents of the restrictive view contend that this definition is functional: anything ever conceived that could serve the function of countering strategic missiles in flight falls within the definition. These persons argue that the three components identified in that paragraph -- missiles, launchers, and radars -- are merely listed as the elements of that an ABM system is "currently consisting of," and that all future components of a system that satisfies the functional definition are also covered by Article II(1). Only when armed with these meanings

can proponents rely on Article V(1) as a ban on development, testing, and deployment of all non-fixed land-based systems or components, whether current or future.

This reading of the Treaty is plausible, but it is not the only reasonable reading; on the contrary, it has serious shortcomings. The premise that Article II(1) defines "ABM system" in a functional manner, meant to include all future systems and components, is difficult to sustain. The provision can more reasonably be read to mean that the systems contemplated by the Treaty are those that serve the functions described and that currently consist of the listed components. The Treaty's other provisions consistently use the phrases "ABM system" and "components" in contexts that reflect that the parties were referring to systems and components based on known technology. Article II(2), for example, further describes the "ABM system components listed in paragraph 1 of this Article," to include those that are operational, being tested, under construction, etc. -- thereby indicating that the definition in Article II(1) was not merely illustrative, but was intended to describe the actual components covered by the Treaty. To take another example, Article V(2) sets limits on the types of "launchers" that may be developed, tested, or deployed -- thus reflecting, in the same article as the alleged prohibition on future mobile systems and components, an exclusive concern for one of the current components listed in Article II(1).

Systems and components based on future technology are not discussed anywhere in the Treaty other than in Agreed Statement D. In that provision, the parties felt a need to qualify the term -- systems and components created in the future -- with the phrase "based on other physical principles." If "ABM system" and "components" actually meant all systems or devices that could serve ABM functions, whether based on present or future technology, the parties would not have needed to qualify these terms in Agreed Statement D. That this qualification was added suggests that the definitions of "ABM system" and "component" in Article II(1) extended only to those based on presently utilized physical principles and not on "other" ones.

The existence of Agreed Statement D poses a fundamental problem for the restrictive view. Nothing in that Statement suggests that it applies only to future systems that are fixed land-based; on the contrary, it addresses all ABM systems and components that are "based on other physical principles." Moreover, the restrictive interpretation would render this provision superfluous. If Article II(1) extended to all ABM systems and components, based on present as well as on future technology, then Article III implicitly would have banned all future fixed land-based systems and components. Such an interpretation, by rendering a portion of a treaty superfluous, violates accepted canons of construction.

The serious difficulties of construction created by the restrictive reading are avoided if one reads Articles II(1) and V(1) as referring only to ABM systems and components based on currently utilized physical principles. Read in this manner, the Treaty establishes a coherent, non-redundant scheme that prohibits:

-- the deployment of all fixed land-based systems and components derived from current technological principles, except as specifically permitted (Article III);

-- the development, testing, and deployment of all mobile systems and components derived from current technological principles (Article V(1); and

-- the deployment of all forms of systems and components derived from "other" physical principles, until after agreement on specific limitations (Agreed Statement D).

Other reasonable contructions of the Treaty have been advanced, but I think that the arguments that I have presented serve to demonstrate the ambiguities present in the text of the ABM Treaty.

Under international law, as under U.S. domestic law, once an agreement has been found ambiguous, one must seek guidance in the circumstances surrounding the drafting of the agreement. Thus, in the present situation, once we concluded that the Treaty is ambiguous, we turned to the negotiating record to see which of the possible constructions most accurately reflects the parties' intentions.

Examining the negotiating record for the ABM Treaty presented some real, albeit mundane, difficulties. No single agency has systematically collected and preserved the entire record in a readily usable form. My staff and I therefore obtained from various sources everything that we could find that might be relevant to the issue of future systems and components. Because we are still in the process of collecting material, I cannot tell you with certainty that I know every single step in the negotiating process. But we are far enough along that I can say with confidence that a much stronger case exists in the record for the broader interpretation of the Treaty than for the restrictive interpretation.

The entire negotiating record is classified, and I therefore cannot reveal any detail in open session. If, after this public session, the Committe chooses to go into executive session, I will be free to explain much more. I can tell you in general, however, that I personally reviewed all the significant statements and drafts in the available negotiating history regarding future systems. I reached the firm conclusion that, although the U.S. delegates initially sought to ban development and testing of non-land based systems or components bsaed on future technology, the Soviets refused to go along, and no such agreement was reached. The Soviets stubbornly resisted U.S. attempts to adopt in the body of the Treaty any limits on such systems or components based on future

technology; their arguments rested on a professed unwillingness to deal with unknown devices or technology. The farthest the Soviets were willing to go with respect to such future systems or components was to adopt a side agreement prohibiting only the deployment of such systems and components, once created, until the parties agreed on specific limitations. The parties did not agree to ban development and testing of such systems or components, whether on land or in space.

The negotiating record also contains strong support for a reading of Article II(1) that restricts the definitions of "ABM system" and "components" to those based on current physical principles. The Soviets specifically sought to prevent broad definitions of these terms, and our negotiators acceded to their wishes. Moreover, our negotiators ultimately convinced the Soviets to adopt Agreed Statement D by arguing that, without it, the Treaty would leave the parties free to deploy systems or components based on other physical principles, such as lasers.

I am aware that some U.S. negotiators in the SALT I talks assert that they achieved a total ban on the development, testing, and deployment of all future mobile systems and components, including those based on other physical principles. The negotiating history contains suggestions as to why they reached their conclusions. But the record of the negotiations fails to demonstrate that they actually succeeded

in achieving their objective. On the contrary, the record reflects that they failed to obtain the ban they sought, and that we could never have enforced such a ban against the Soviets. Treaties, like other agreements, are enforceable only to the extent they create mutual rights and duties. In effect, because the Soviets succeeded in avoiding a broad binding commitment regarding the development and testing of mobile systems and components based on future technology, we cannot properly be said to be bound by such a commitment.

I wish to close by reiterating a critical point. Notwithstanding our belief in the merits of the broader interpretation, the President has decided to pursue the SDI program as currently structured, which can be accommodated within the confines of the "restrictive" interpretation -- namely, research into, but not development or testing of, systems or components based on future technology and capable of substituting for ABM interceptors, launchers, or radars.

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